Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JOHN T. CASADOS, JERRY DRAPER, ROLAND CARTER, and AUGUSTINE VILLALOBOS and all others similarly situated,

Petitioners,

v.

THE CITY AND COUNTY OF DENVER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER EXECUTIVE ORDER NO. 94 ALLOWING INVOLUNTARY SEARCHES OF GOVERNMENTAL EMPLOYEES' BODILY FLUIDS IS FACIALLY REASONABLE UNDER THE FOURTH AMENDMENT WHERE NO GOVERNMENTAL SPECIAL NEED FOR TESTING IS ESTABLISHED, NO PROCEDURAL SAFEGUARDS DEFINE "REASONABLE SUSPICION," NO EVIDENCE SHOWS DIMINISHED INDIVIDUAL PRIVACY INTERESTS, AND NO BALANCING OF ESTABLISHED GOVERNMENTAL INTERESTS AGAINST INDIVIDUAL PRIVACY INTERESTS OCCURS.

PARTIES

Petitioners John T. Casados, Jerry Draper, Roland Carter, and Augustine Villalobos, and all others similarly situated, and Respondent City and County of Denver, and Mayor Federico Peña as Mayor of the City and County of Denver

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No. _____

In The

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JOHN T. CASADOS, JERRY DRAPER, ROLAND CARTER, and AUGUSTINE VILLALOBOS and all others similarly situated,

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Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

John T. Casados, Jerry Draper, Roland Carter, Augustine Villalobos and all others similarly situated, respectfully petition this Court for a writ of certiorari to review a decision of the Colorado Supreme Court.

OPINION BELOW

The opinion of the Colorado Supreme Court is reported at 862 P.2d 908 (Colo. 1993) and reproduced at

App. 1a-32a. The opinion and order issued by the Colorado Court of Appeals is reported at 832 P.2d 1048 (Colo. Ct. App. 1992) and reproduced at App. 35a-46a.

JURISDICTION

The Colorado Supreme Court's judgment was issued on October 4, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS

A. This case involves the Fourth Amendment to the United States Constitution.

B. This case involves provisions of Executive Order No. 94, reproduced in its entirety at App. 48a-62a.

INTRODUCTION

This case involves a Fourth Amendment constitutional challenge to Denver's Executive Order No. 94. The Executive Order authorizes drug and alcohol testing of each and every employee of the City and County of Denver, without regard to the nature of the job position.

The City and County of Denver has never established any special need to test all its employees. No nexus exists between the governmental interest and the testing. The

Supreme Court of Colorado has never attempted to balance the privacy interest of employees against the government's interest in subjecting them to blood and urine testing.

STATEMENT OF THE CASE

A. The Petitioners:

Petitioners, certified employees of the City and County of Denver's Public Works Department, are all members of minority groups who were subjected to Executive Order No. 94.

Petitioner John Casados was ordered by his supervisor to submit to a drug test because Casados came to work angry. Casados was angry because he had been denied the opportunity to earn overtime, in violation of his seniority rights as defined by the Department. When Casados continued to be "loud and profane," his supervisor found his behavior "irrational," invoked Executive Order No. 94 and ordered Casados to Denver General Hospital for testing. Casados refused and was fired for disobeying a supervisor's order. When Casados' supervisor ordered him to submit to drug testing, Casados had only been at work a short time and had not yet been assigned to a work duty.

Petitioner Jerry Draper was assigned to "light duty" because of a back injury. When his supervisor attempted to assign Draper to a non-light duty assignment, Draper complained to his supervisor about the assignment. His supervisor ordered Draper to Denver General Hospital

for testing based on a "reasonable suspicion" that Draper was under the influence of alcohol. Draper refused and was fired pursuant to Executive Order No. 94. A Denver City and County hearing officer later determined that Draper's supervisor had vowed to fire Draper when he became his supervisor. The hearing officer also held that Draper's supervisor's "animosity toward appellant was so great as to cause him to accuse him of being under the influence of alcohol while on duty when he had not even a reasonable suspicion of such being true."

Petitioner Augustine Villalobos complained to his supervisor's superior that his immediate supervisor was verbally and physically abusive to him. He was sent to Denver General Hospital to have his thyroid checked. At the Hospital, Villalobos was informed that he was to be tested for drugs and alcohol pursuant to Executive Order No. 94 because he was "hallucinating." When Villalobos refused to be tested, his supervisors rescinded the drug test order.

Petitioner Roland Carter had just arrived at work but had not yet commenced his duties. His duties included maintenance of airport facilities such as the sliding glass doors of the terminal building. Carter was approached by his supervisors and ordered to Denver General Hospital because of a reasonable suspicion that he was under the influence of alcohol. Carter tested positive and was terminated under Executive Order No. 94. Although the City has an Employee Assistance program, and although under the provisions of Executive Order No. 94 employees who test positive "may" be given the option of attending the program in lieu of termination, Carter was not given that option. At the time of his termination,

Carter's personnel file was devoid of any prior criticism or discipline.

None of the Petitioners were engaged in positions of a safety-sensitive nature when they were ordered under Executive Order No. 94 to submit to urine and blood testing. Nor did their positions entail carrying firearms or handling sensitive or confidential information. Under the provisions of Executive Order No. 94, low-level, utterly untrained supervisors may order employees to submit to involuntary blood and urine drug testing purely on their own accords and without any requirement for documentation of their observations, or corroboration with others.

B. Warrantless Searches Pursuant to A Special Government Need

The Fourth Amendment guarantees the security, privacy and dignity of citizens by prohibiting the government from conducting unreasonable searches and seizures. Except in limited circumstances, a search or seizure is not reasonable unless conducted pursuant to a warrant issued upon probable cause. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 621-22 (1989). The warrant requirement serves to protect privacy interests because searches under warrant are limited in scope and serve a legitimate, established governmental goal. Further, the warrant clause interjects a neutral magistrate between the government and the party it wishes to search. *Skinner*, 489 U.S. at 622.

A search within the limited warrantless exception "must be based, as a general matter, on probable cause to believe that the person to be searched has violated the

law." *Skinner*, 489 U.S. at 624. However, in certain specified areas of the warrantless exception, probable cause is not an "irreducible requirement of a valid search". *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Outside the criminal context, when this Court has allowed searches and seizures without traditional warrant and probable cause requirements, it has applied a "special needs" analysis.

Under this analysis, the government must first articulate what the "special need" for the search is, and then determine whether the need to conduct the search makes it impractical to require a warrant or some level of individualized suspicion. After identifying, establishing and analyzing the government's special need to conduct a search, the individual's privacy interests are identified and analyzed. The competing interests are then weighed. Only if the government's need to conduct the search outweighs the individual's privacy interest is the search constitutionally reasonable absent a warrant and probable cause. *Skinner*, 489 U.S. at 623-24.

1. Reasonableness is Based Upon the Context of the Search and Seizure

With regard to warrantless search and seizure pursuant to special governmental need, "[w]hat is reasonable [under the Fourth Amendment] depends on the context within which a search takes place. *T.L.O.*, 469 U.S. at 337. This Court has recognized such special needs to conduct a search in the following contexts: public schools, *New*

Jersey v. T.L.O., 469 U.S. 325 (1985) (student's purse); office environment, *O'Connor v. Ortega*, 480 U.S. 709 (1987) (desks and steel file cabinets); safety and security sensitive job positions *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine and blood testing of employees for alcohol/drugs). Although *Ortega* was the first case to discuss searches of the *office environment* of public employees, it was not until *Skinner* and *Von Raab* that the search of the *person* of the public employee was discussed. In fact, this Court specifically stated that *Ortega* did not present "the issue of the appropriate standard of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items . . . *nor do we address the proper Fourth Amendment analysis for drug and alcohol testing of employees.*" *Ortega*, 480 U.S. at 729, n.**.

2. Highly Intrusive Searches Are Reasonable Only Where There is a Special Governmental Need to Search

Unless an established "special need" of the government outweighs the privacy interests of the individual, a search must meet the warrant and probable cause requirements of the Fourth Amendment. As Justice Scalia stated in his *Von Raab* dissent, "While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search is 'reasonable,' the answer depends largely upon the social necessity that prompts the search." *Von Raab*, 489 U.S. at 681.

This Court first ruled how governmental searches of employees' urine and blood testing for drugs could be

held reasonable under the Fourth Amendment in *Skinner v. Railway Labor Executives' Ass'n,* (railway employees) and *National Treasury Employees Union v. Von Raab,* (U.S. Customs Department employees). In the context of those cases, the Court found that the governmentally-regulated railroad and the United States Customs Department presented compelling special needs beyond the normal need for law enforcement. Those special needs made the Fourth Amendment warrant and probable cause requirement impractical. The special need in *Skinner* was to protect the public from train accidents caused by drug and alcohol-impaired employees. The railroad interest was established by compelling evidence of an historical problem relating to drug and alcohol-impaired employees. A nexus was established between testing employees in certain positions for drug and alcohol impairment and the need to protect against train accidents.

In *Von Raab* the special need was to deter and prevent the promotion of drug users to certain positions within the U.S. Customs Department, including those positions where firearms were carried. Evidence of the Department's "special need" included (1) the vulnerability of certain Customs employees to corruption, and (2) the dangers of a drug-inhibited employee carrying a firearm.

3. Search of Employees' Bodily Fluids Are Reasonable Only When Employees' Privacy Interests or Expectations Have Been Diminished

In both *Skinner* and *Von Raab,* this Court identified and carefully scrutinized affected employees' privacy

interests. This Court first observed that "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances." The Court found that "*certain forms* of public employment" diminish individual privacy concerns, *Von Raab*, 489 U.S. at 671 (emphasis added). The Court followed that same reasoning in *Skinner*.

In *Skinner*, the Court reasoned that employees' fitness and probity for the job in that highly-regulated industry were already intensively scrutinized by periodic physical examinations. Also, the safety-sensitive nature of the subject employees' specific job positions further diminished their privacy interests because employees holding such job positions are aware that freedom from alcohol or drug impairment are of prime importance to safety. After a thorough analysis of the covered employees' privacy interests, those interests were weighed against the railway's compelling need to conduct the search. The railway's need outweighed the employees' diminished privacy expectations and the search was found constitutionally valid absent a warrant and probable cause. Of great importance to the case at bar, this Court noted that an employee's privacy interests might *not* be diminished in the context, logic and history of other situations. *Skinner*, 489 U.S. at 627-28.

Employees' privacy expectations were diminished in *Von Raab*. In job positions involving drug interdiction, employees should expect "effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672. The requirement that Customs employees who carry firearms where "judgment and dexterity" became crucial also diminished

privacy expectations because such employees should know the Service is entitled to make intrusive inquiries into their fitness. *Id.* Further, this Court found that procedural safeguards within the testing program itself minimized the privacy interests to be weighed in the balance. The subject employees were given advance notice of testing, thus reducing "to a minimum any 'unsettling show of authority' . . . ." *Von Raab*, 489 U.S. at 672 n.2. The subject employees were not required to disclose personal medical information, but could choose to do so to refute a positive test. *Id.* Finally, only those employees who held positions in two of three specified categories could be tested. When balanced against the Service's compelling need for the search, the subject employees' diminished privacy interest did not outweigh the government's need.

4. The Reasonable Suspicion Standard Must Be Applied With Procedural Safeguards Protecting Against Unfettered Discretion

This Court found that use of procedural safeguards in conjunction with the reasonable suspicion standard minimized the possibility of abuse of discretion regarding who would be tested. In *Skinner*, verification by another supervisor was required when impairment was suspected. In the case of suspected drug related impairments, at least one of the two supervisors involved must have received specialized training in detecting the signs of drug intoxication.

C. Executive Order No. 94

On October 27, 1988, Mayor Federico Peña issued Executive Order No. 94, establishing the City and County of Denver's policy regarding the use, possession or sale of alcohol or other drugs by any person employed by the City and County of Denver. App. 48a-62a. The stated purpose of Denver's Order was "to ensure safe, healthful and efficient working conditions for its employees." App. 48a. The Order is applicable to every employee within the City and County of Denver without regard to the nature of his or her job.

The Order authorizes the taking of an employee's urine and blood for alcohol and drug testing whenever a supervisor has "reasonable suspicion" that the employee is under the influence of alcohol or drugs. App. 51a-53a. The suspected employee is then taken to one of the following locations for alcohol and/or drug testing: the Occupational Health and Safety Center (day hours), Denver General Psychiatric and Substance Abuse Emergency Room Service, or the Denver Police Department DUI facilities. App. 52a. If a supervisor has a reasonable suspicion that an employee appears to be in possession of or selling or transferring illicit drugs, the police are to be contacted. App. 52a-53a. If the employee refuses to be tested and drives off in his or her own vehicle, the police must be immediately notified. App. 52a. If an employee is involved in a "workplace accident," drug and alcohol screening may be justified, even absent observable symptoms of being under the influence, if the accident may have been caused by human error which could be drug or alcohol related. App. 53a. A positive testing or refusal to be tested is grounds for discharge. App. 53a.

Executive Order No. 94 gives low-level supervisors complete discretion in ordering drug and alcohol testing of employees. No procedures exist to protect employees from their supervisors' abuse of discretion with regard to these tests. For example, there is no requirement for contemporaneous documentation of the grounds for the supervisor's reasonable suspicion. Neither does the Order require any concurrence in the finding of reasonable suspicion by either another supervisor or anyone else. The Order has no requirement for supervisory training in detecting drug or alcohol impairment. The Order makes absolutely no distinction between on or off-duty alcohol or drug use, leaving open the possibility of involuntary testing being triggered by one supervisor's reasonable suspicion of off-duty drug use.

D. This Litigation:

In February 1990 Petitioners filed a class action complaint in the City and County of Denver District Court challenging the constitutionality of Executive Order No. 94 and requesting declaratory and injunctive relief barring its enforcement. Their complaint, as subsequently amended, alleged that Executive Order No. 94 violated and continued to violate their rights to be free from unreasonable searches, violated their rights to privacy, to due process of law and to equal protection of the law. The Respondents' motion to dismiss for failure to state a claim for relief was granted by the trial court on June 25, 1990.

Petitioners timely appealed the district court decision and on January 16, 1992, the Colorado Court of Appeals, in a unanimous decision, reversed with regard to the Fourth

Amendment claim. App. 35a. The court held that Executive Order No. 94 violated Petitioners' Fourth Amendment right to be free from unreasonable searches and seizures.

In reaching its determination, the Colorado Court of Appeals found that the act of taking blood and the process of collecting urine for testing for alcohol and drugs was an invasion of Petitioners' privacy rights and constituted a search within the meaning of the Fourth Amendment. For this proposition, the Colorado Court of Appeals relied upon the Supreme Court's holding in *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989).

The appellate court then analyzed whether the search was reasonable by balancing the individual privacy interests of Denver City and County employees against the stated governmental interests as found in Executive Order No. 94. Relying on *Skinner* and *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989), the Colorado Court of Appeals unanimously found that the stated purpose of Denver's executive order, "maintaining safe, healthful, and efficient working conditions for its employees" did not outweigh the employees' legitimate privacy interests.

The Colorado Court of Appeals noted that, contrary to the holding in *Skinner*, Denver could test not only its employees in safety sensitive positions, such as police officers and firefighters, but also any of its other employees. The Colorado Court of Appeals then remanded the case, saying "[T]he question of which plaintiffs, if any, may be tested for drugs and/or alcohol cannot be resolved without an evidentiary hearing or, at least, proper verification describing plaintiffs' job functions and their relationships to public safety." App. 45a.

The City and County of Denver then appealed to the Colorado Supreme Court. Certiorari was granted to determine whether the Colorado Court of Appeals erred in its analysis of Petitioners' Fourth Amendment challenge to the facial constitutionality of Executive Order No. 94's provision for reasonable suspicion testing.

On October 14, 1993, the Colorado Supreme Court reversed, in a 5-2 decision, holding that "the provisions of [Executive] Order [No. 94] that pertain to drug testing based on reasonable suspicion are not facially invalid under the Fourth Amendment and the plaintiffs have failed to state a claim that they are, regardless of whether the plaintiffs hold safety sensitive positions." The Colorado Supreme Court relied upon two Courts of Appeal decisions interpreting *Skinner* and *Von Raab*: *American Federation of Government Employees, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992) and *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D. C. Cir. 1990).

REASONS FOR GRANTING THE WRIT

The Fourth Amendment right to be free from unreasonable searches and seizures has been extinguished for a great many public employees because of the improper application and expansion of the Supreme Court's decisions in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). It is vital that this Court define the Fourth Amendment analysis for search and seizure of employees' urine and blood for testing when those employees hold positions outside the contexts of *Skinner* and *Von Raab*. This Court has not yet addressed the issue

of whether a government may test its employees' bodily fluids where no special need rising to the compelling level of *Skinner* or *Von Raab* is established, where there is no showing of diminished individual privacy rights to weigh in the balance against governmental interest as in *Skinner* and *Von Raab*, and where no procedural safeguards protect against unfettered discretion when the reasonable suspicion standard is used.

A. The Decision Below Did Not Apply A Special Needs Analysis As Required Under *Skinner* and *Von Raab*

The Colorado Supreme Court neither articulated nor discussed any special needs of the City and County of Denver to conduct searches of its employees, as required by *Skinner* and *Von Raab*. The City and County of Denver has never put forth any evidence of a special need to justify its search of its employees' urine and blood for drugs and alcohol.

The only interest or need for testing that the City and County of Denver has ever stated is found in Executive Order No. 94: "to ensure the safe, healthful and efficient working conditions for its employees." When the only interest for testing is to protect the general integrity of the work force, this is not enough. *Taylor v. O'Grady*, 888 F.2d 1189, 1199 (7th Cir. 1989). Colorado Supreme Court Justice Vollack in his dissent is absolutely correct when he states "[I] conclude that there are no special needs in this case and that no interests need to be balanced." App. 19a.

The Colorado Supreme Court, by reversing the Colorado Court of Appeals, has ruled in effect that no special

need for the testing has to be established. The decision of the Colorado Supreme Court supports the proposition that public employment alone is justification for subjecting employees to mandatory, highly-intrusive urine and blood searches.

The Colorado Supreme Court has ruled that each and every Denver City and County employee is subject to drug testing based upon his or her supervisor's reasonable suspicion that the employee is under the influence of drugs or alcohol. The Colorado Supreme Court neither articulated the special need for the testing nor analyzed the competing interests. The Colorado Supreme Court did not attempt to balance the need of the City and County of Denver to conduct involuntary blood and urine tests on its employees against the employees' substantial privacy interests in bodily integrity. The Colorado Supreme Court reached this result by relying on two United States Court of Appeals decisions interpreting *Skinner* and *Von Raab*: *American Federation of Government Employees, Local 2391 v. Martin*, 969 F.2d 733 (9th Cir. 1992) and *National Treasury Employees Union v. Yeutter*, 918 F.2d 963 (D.C. Cir. 1990).

B. Review is Necessary To Resolve Lower Courts' Conflict in Interpreting *Skinner* and *Von Raab* in Other Employment Contexts

The Colorado Supreme Court followed *Yeutter's* misapplication of *Skinner* and *Von Raab*. The *Yeutter* decision involved an appeal of a district court ruling permitting United States Department of Agriculture (USDA) random testing of certain USDA motor vehicle operators and reasonable suspicion testing of other Department

workers. Colorado Supreme Court Justice Vollack points out in his dissent that the *Yeutter* court was aware of the correct analysis because it stated that the validity of both random and reasonable suspicion testing depended upon identifying a special government need and balancing that need against the employees' privacy expectations. However, the *Yeutter* court did not apply this analysis.

> [T]he *Yeutter* court did not articulate government interests when attempting to engage in "balancing." Further, the *Yeutter* court, after reiterating its previous holding, did not determine whether there was a "direct nexus" between *all* USDA employees and any feared violation.

Justice Vollack, dissenting, App. 24a (emphasis in original).

The Colorado Supreme Court's reliance on *Local 2391* is misplaced because the context of *Local 2391* dealt with the drug testing of Department of Labor employees in public health and safety-sensitive or security-sensitive positions for on-duty drug use. The context of Denver's drug testing program for all employees and the context of *Local 2391*'s program are different and must be analogized in clear light of their differences.

The Colorado Supreme Court took guidance from cases interpreting *Skinner* and *Von Raab* in its decision finding Executive Order No. 94 facially valid, but the context of the case at bar differs from the context of *Skinner* and *Von Raab*. The City and County of Denver's program is *not* limited to those individuals holding positions that are safety-sensitive or otherwise sensitive. Instead, *any* and *all* employees can be tested whether secretaries or office clerks, janitors, firefighters or police officers. Denver has *not* identified any special needs to

test. The City and County of Denver has *not* trained supervisors in the detection of drug impairment. Supervisors are *not* required to verify their reasonable suspicion observations with any other supervisor or higher-level official. The City and County of Denver *never* demonstrated that its employees' privacy interests had been diminished by their job positions. The City and County's need for the search was *neither* established *nor* was it weighed against the employees' privacy interests.

CONCLUSION

This case raises critical issues regarding the government's ability, outside the traditional Fourth Amendment parameters, to search its citizens.

The City and County of Denver's Executive Order No. 94 is facially unreasonable under the Fourth Amendment. Governmental entities should not be constitutionally permitted to conduct involuntary searches of employees bodily fluids, absent any showing of special governmental need, and with no other justification than a supervisor's incantation of the "reasonable suspicion" standard. This is especially so if the government can order an intrusive search of this magnitude when the allegation of drug abuse is undocumented, unverified, and the supervisor is untrained in the indicia of drug impairment. A Denver City and County employee's right to be secure against unreasonable searches is at the mercy of petty officials' unfettered discretion. Denver's Executive Order No. 94 is constitutionally unreasonable under the special needs analysis set forth by this Court. The

decision of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO
NO. 92SC195 October 4, 1993

THE CITY AND COUNTY OF DENVER and
FEDERICO PEÑA, in his official capacity
as Mayor of the City and County of Denver, Petitioners,
v.
JOHN T. CASADOS, JERRY DRAPER, ROLAND CARTER,
and AUGUSTINE VILLALOBOS, and all others
similarly situated, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED

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JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE VOLLACK dissents and JUSTICE KIRSHBAUM joins in the dissent.

In *Casados v. City and County of Denver*, 832 P.2d 1048 (Colo. App. 1992), the Colorado Court of Appeals

held that the plaintiffs[1] stated a claim under the Fourth Amendment[2] that certain provisions of an Executive Order issued by the Mayor of the City and County of Denver are facially unconstitutional. We reverse and remand for further proceedings consistent with this opinion.

I

On October 27, 1988, then Mayor Federico Peña of the City and County of Denver issued Executive Order No. 94 (the Order). Among other things, the Order implemented for non-law-enforcement purposes a mandatory blood- and urinalysis-drug-testing program for Denver employees. In April of 1990, the Denver District Court granted leave to the plaintiffs to file an amended class action complaint raising, among other issues, a facial challenge under the Fourth Amendment to the Order's

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[1] The respondents in this class action are John T. Casados, Jerry Draper, Roland Carter, and Augustine Villalobos. They were the named plaintiffs in the district court proceedings, and because the issue of class certification has not yet been addressed, and is not before this court, we refer to them collectively as the plaintiffs.

[2] In *Wolf v. Colorado*, 338 U.S. 25 (1949), the United States Supreme Court held that the Fourth Amendment to the United States Constitution is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 27-28. Strictly speaking, therefore, the issue before the court of appeals was whether the plaintiffs stated a claim under the Fourth Amendment as made enforceable against the states through the Due Process Clause of the Fourteenth Amendment.

provisions for alcohol and drug testing based on reasonable suspicion of alcohol or drug use or impairment.[3] The

---

[3] The Order states in relevant part:

Policy Overview

. . .

The City . . . has a vital interest in maintaining safe, healthful and efficient working conditions for its employees. Being under the influence of a drug or alcohol on the job may pose serious safety and health risks not only to the user but to all those who work with the user. The possession, use or sale of an illegal drug or use of alcohol in the workplace may also pose unacceptable risks for safe, healthful and efficient operations.

. . .

Policy Statement

. . .

II. ON-THE-JOB USE, POSSESSION OR SALE OF DRUGS OR ALCOHOL

A. Alcohol

Being under the influence or impaired by alcohol by any employee while performing City business or while in a City facility is prohibited. . . .

. . .

C. Illegal Drugs

The use, sale, purchase, transfer or possession of an illegal drug by any employee while in a City facility or while performing City business is prohibited. . . .

Policy Implementation

III. PROCEDURES FOR MANAGEMENT AND SUPERVISORS

When a supervisor has reasonable suspicion that an employee is in violation of this policy the supervisor should immediately consult with an appropriate member of the in-house personnel staff or with the City Attorney's Office to determine further actions. However it is recognized that if the employee appears to be under the influence of drugs or alcohol, or alcohol or drugs are in his or her possession, immediate action may be required.

defendants[4] responded with a motion to dismiss under C.R.C.P. 12(b)(5), and on June 25, 1990, the district court issued a two-sentence order stating:

> Where this is the situation, the supervisor should do the following:
>
> A. Under the Influence of Alcohol
>
> The supervisor should confront the employee with the suspicion and order the employee to the Occupational Health and Safety Center (day hours) or Denver General Psychiatric and Substance Abuse Emergency Room Service or the Denver Police Department DUI facilities for an evaluation. . . .
>
> . . .
>
> B. Use, Possession or Sale of Illicit Drugs
>
> When a supervisor has reasonable suspicion that an employee appears to be using illicit drugs while on duty the same procedures apply as when a supervisor has reasonable suspicion that an employee appears under the influence of alcohol.
>
> . . .
>
> C. Drug and Alcohol Screening
>
> Employees may be required to submit to blood, or urine or other alcohol or drug screening where there is reasonable suspicion of illicit use or the employee is under the influence of or impaired by alcohol or drug. . . .
>
> V. NON-COMPLIANCE BY THE EMPLOYEE
>
> . . . [N]oncompliance with the supervisor's order to be evaluated . . . will be viewed as refusal to obey the order of a supervisor and subject [sic] to discipline, which may include dismissal.
>
> VI. DISCIPLINARY ACTION
>
> Violation of this policy can result in a disciplinary action, up to and including dismissal, even for a first offense. . . .

[4] Named as defendants were the City and County of Denver, Federico Peña in his official capacity as mayor of the City and County of Denver, the Department of Public Works, and William Roberts in his official capacity as head of the City and County of Denver's Department of Public Works.

> IT IS ORDERED, based upon the memorandum briefs submitted, that Defendants' Motion to Dismiss shall be and the same is hereby GRANTED.
>
> IT IS FURTHER ORDERED that a judgment of dismissal, with prejudice, be and the same is hereby entered in favor of the Defendants and against the Plaintiffs.

The plaintiffs appealed, and the court of appeals reversed. *See Casados*, 832 P.2d 1048. The court of appeals held that the plaintiffs did state a claim that the Order's provisions for drug testing based on reasonable suspicion of alcohol or drug use or impairment are facially invalid under the Fourth Amendment. *Id.* at 1052-54.[5] The court based this holding on the view that even if there is reasonable suspicion that a government employee is under the influence of a drug or alcohol, or is using an illicit drug, it is unconstitutional for the government to

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[5] The defendants appended several affidavits to their Amended Brief in Support of Motion to Dismiss submitted to the district court, and the defendants argued before the court of appeals that the district court treated their motion to dismiss as a motion for summary judgment. *Cf.* C.R.C.P. 12(b) ("If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . . ").

There is nothing, however, in the district court's June 25, 1990, order to suggest that it treated the defendants' motion as one for summary judgment. Furthermore, the court of appeals treated the defendants' motion as a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim. *Casados*, 832 P.2d at 1053-54. We therefore do the same.

require the employee to take a blood or urine test unless that employee works in a safety-sensitive position. *Id.* at 1053. Because the court construed the Order as covering all employees, *id.*, it remanded the case in order to give the plaintiffs an opportunity to prove the facts that would entitle them to relief, *id.* at 1053-54, specifically, that they do not hold safety-sensitive positions,[6] and that their other material allegations are true.

We granted certiorari to determine whether the court of appeals erred in its analysis of the plaintiffs' Fourth Amendment challenge to the facial constitutionality of the Order's provisions for reasonable suspicion testing. We do not agree that the plaintiffs have stated a claim under the Fourth Amendment that the Order's provisions for testing based on reasonable suspicion of alcohol or drug use or impairment are facially invalid. However, the plaintiffs are entitled to pursue their as-applied constitutional challenges to the Order, as well as any remaining claims made by them in their amended complaint and asserted on appeal that were not addressed by the court

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[6] In the amended complaint, each plaintiff alleged that he was a classified employee of Denver, and that he was either suspended or terminated for refusal to take an alcohol or drug test, or terminated after taking and failing an alcohol test, pursuant to the alcohol- and drug-testing policy implemented by the Order. However, the amended complaint is silent on whether any or all of the plaintiffs held safety-sensitive positions.

of appeals.[7] Accordingly, we reverse and remand for further proceedings consistent with this opinion.

II

Our analysis of the plaintiffs' facial challenge to the constitutionality of the Order is guided primarily by two recent decisions by the United States Court of Appeals, specifically, *American Federation of Government Employees, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992), and *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990). These decisions are in turn guided in significant part by three United States Supreme Court decisions, specifically, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding suspicionless blood and urine testing of railroad employees involved in certain types of train accidents, and breath and urine testing of railroad employees who [sic] supervisors have reasonable suspicion to believe are under the influence of a drug or alcohol), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless urine testing of United States Customs Service employees seeking transfer or promotion to positions where they would be directly involved in the interdiction of illegal drugs, or would be required to carry firearms or to handle classified information that is truly sensitive), and *O'Connor v.*

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[7] The court of appeals rejected the plaintiffs' claim that the Order is unconstitutionally vague and therefore violates their rights to due process of law under the Fourteenth Amendment to the United States Constitution and Article II, § 25, of the Colorado Constitution, *Casados*, 832 P.2d at 105-52, and the plaintiffs did not seek certiorari review of those issues.

Ortega, 480 U.S. 709 (1987) (plurality opinion) (upholding investigatory search of public employee's office for evidence of work-related misfeasance based on supervisor's reasonable suspicion that such evidence would be found).

The Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer. *Von Raab*, 489 U.S. at 665. Furthermore, the taking of a blood or urine sample by the government is deemed a search under the Fourth Amendment. *Skinner*, 489 U.S. at 616-17. Although a search must usually be supported by a warrant issued upon probable cause, *Von Raab*, 489 U.S. at 665, neither a warrant nor probable cause is an indispensable component of reasonableness in every circumstance. *Id.; Skinner*, 489 U.S. at 618-24. Rather, "[w]hat is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself,' " Skinner, 489 U.S. at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)), and "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,' " *id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

Exceptions to the warrant and probable cause requirements may be permitted when "special needs, beyond the normal need for law enforcement," are involved. *Id.* at 619. Such special needs are presented by the government's interest in "its operation of a government office." *Id.* at 620. *See also, Ortega*, 480 U.S. at 724-25 (recognizing "substantial government interests in the efficient and proper operation of the workplace"); *Yeutter*,

918 F.2d at 974 ("USDA's interest in efficient operations may justify departure from warrant and probable cause requirements" in certain circumstances.) When faced with such special needs, it is appropriate "to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner*, 489 U.S. at 619. After engaging in such a balancing, the court in *Yeutter* concluded that privacy concerns implicated by mandatory urinalysis did not outweigh the USDA's interest "in testing employees reasonably suspected of using drugs, or of being drug-impaired, while on duty." *Yeutter*, 918 F.2d at 975.

At issue in *Yeutter*, 918 F.2d 968, was the United States Department of Agriculture's (USDA's) Drug-Free Workplace Program implemented in response to Executive Order 12,564, which barred drug use by federal employees on and off duty, and which directed each executive agency to develop a plan for achieving a "drug-free workplace." *Id.* at 970. Under the USDA's program, all USDA employees, including USDA Food and Nutrition Service (FNS) employees, were subject to reasonable suspicion urinalysis-drug-testing. *Id.* at 972. If an FNS employee was suspected of on-duty or off-duty drug use, his or her supervisor would inform the FNS's Personnel Director, who would make a final determination of whether reasonable suspicion existed. *Id.* The court read *Skinner*, *Von Raab*, and *Ortega*, as well as two of its own previous decisions, as "suggest[ing] that, outside of the law enforcement context, the government's legitimate interest in employee drug testing extends no further than its interest in workplace conduct and performance of

work responsibilities." *Id.* at 974. Recognizing also that the government has an interest in detecting and preventing off-duty drug use by those who hold safety- or security-sensitive jobs, *id.* at 974-75, the court held that the USDA program was unconstitutional only "insofar as it authorizes mandatory drug testing of FNS workers who do not hold safety- or security-sensitive jobs, absent reasonable suspicion of on-duty drug use or drug-impaired work performance," *id.*; *accord American Fed'n of Gov. Employees v. Derwinski*, 777 F. Supp. 1493, 1501 (N.D. Cal. 1991). In other words, *Yeutter* holds that it *is* constitutional to subject *all* FNS employees to mandatory urine tests based on reasonable suspicion of *on-duty* drug use or impairment, but that it is *not* constitutional to subject employees who do *not* hold safety- or security-sensitive jobs to mandatory urine tests based only on reasonable suspicion of *off-duty* drug use or impairment.

At issue in *Local 2391*, 969 F.2d 788, was the United States Department of Labor's (DOL's) Drug-Free Workplace Program, also implemented in response to Executive Order 12,564. *Id.* at 78990. The DOL's program distinguished between DOL employment positions determined to be public health and safety- or national security-sensitive, which it referred to as "testing designated positions" or "TDPs," and all other DOL employment positions. *Id.* at 790. Under the program, a urine test could be administered to any TDP employee based on reasonable suspicion of on-duty *or* off-duty drug use. *Id.* The court observed that although *Yeutter* held that employees who do *not* hold safety- or security-sensitive

positions can only be tested based on a reasonable suspicion of *on-duty* drug use or impairment, *Yeutter* did not decide whether employees who *do* hold safety- and security-sensitive positions can be tested based only on a reasonable suspicion of *off-duty* drug use or impairment. *Id.* at 791. Relying primarily on *Skinner, Von Raab,* and *Ortega,* but also on several of its own previous decisions, the court in Local 2391 held that it was *not* facially unconstitutional for the DOL's program to subject TDP employees to urine tests based only on reasonable suspicion of off-duty illegal drug use or impairment. *Id.* at 791-93. In so holding, the court emphasized the DOL's interest in preserving public health and safety, *id.* at 793, and that "the threshold requirement of reasonable suspicion minimizes the intrusion on the employees' privacy interests," *id.* The court also emphasized that its holding did not preclude an as-applied constitutional challenge to the program, *id.*, in the event, for example, that testing was ordered without reasonable suspicion based on objectively reliable evidence, *see id.*[8]

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[8] The court explained:

> Reasonable suspicion drug testing of TDP employees is not random and unannounced. Rather, as the name suggests, such testing is based on objective evidence of on- or off-duty drug use. Furthermore, for purposes of testing for off-duty drug use . . . , objective evidence must consist of credible eyewitness observations of illegal drug use or impairment. Finally, the Plan vests only minimal discretion in the officials charged with implementing reasonable suspicion testing. Supervisors are trained to recognize facts giving rise to reasonable suspicion. They also must document all such facts and circumstances including dates and times of off-duty drug use or impairment as

The results in *Yeutter* and *Local 2391*, to the extent that they are relevant to the issue before us, accord with both precedent and reason. Accordingly, the Order's provisions for testing based on reasonable suspicion are facially invalid under the Fourth Amendment if they (A) provide for mandatory testing of employees who do *not* hold public safety- or security-sensitive positions, based only on reasonable suspicion of *off-duty* alcohol or drug use or impairment, or (B) provide for mandatory testing of employees who *do* hold public safety- or security-sensitive positions, based on *off-duty* alcohol or drug use or impairment, but with less than objectively established reasonable suspicion of such use or impairment.

A

In determining whether the Order provides for mandatory testing of employees who do *not* hold public safety- or security-sensitive positions, based only on a reasonable suspicion of *off-duty* alcohol or drug use or impairment, we begin with the plain language of the Order. According to the Order, *see supra* note 3, an employee must be prepared to submit to an "evaluation" if a supervisor has reasonable suspicion that the employee "appears to be under the influence of drugs or alcohol," or if "a supervisor has reasonable suspicion that [the] employee appears to be using illicit drugs while on duty." In addition, employees must be prepared to submit to "blood, or urine or other alcohol or drug screening

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reported by reliable and credible sources before recommending a drug test.

Local 2391, 969 F.2d at 793.

where there is reasonable suspicion of illicit use or the employee is under the influence of or impaired by alcohol or drug."

These provisions do not explicitly limit their application to employees who hold public safety- or security-sensitive positions, and some are not explicit with respect to whether they refer to on-duty or off-duty behavior, or both. In particular, the provision of the Order stating that an employee must be prepared to submit to "blood, or urine or other alcohol or drug screening where there is reasonable suspicion of illicit use" could be interpreted as authorizing mandatory blood- or urinalysis-drug-testing of employees who do *not* hold public safety or security-sensitive positions, based only on a reasonable suspicion of *off-duty* behavior.

In addressing the plaintiffs' facial challenge to the constitutionality of the Order, however, it is appropriate that we presume that the Order is constitutional. *See National Treasury Employees Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) ("A facial challenge to an Executive Order, like a facial challenge to legislation, 'is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid.'") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *Liberty Mut. Ins. Co. v. Friedman*, 485 F. Supp. 695, 716 (D. Md. 1979) (statutes and executive orders are entitled to a presumption of constitutionality), *rev'd on other grounds, Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981); *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644, 647 (Colo. 1991) ("Legislation designed to protect the public's health and safety is entitled to a

presumption of constitutionality."). Accordingly, we must adopt any reasonable and practical interpretation of the Order that renders it facially constitutional. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973) ("our task is not to destroy [an] Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations"); *Renteria v. Colorado State Dep't of Personnel*, 811 P.2d 797, 799 (Colo. 1991) ("whenever it is reasonable and practical, a statute must be construed in a manner consistent with constitutional requirements" and "when a statute is susceptible to both constitutional and unconstitutional interpretations, we must adopt the constitutional interpretation"). We therefore consider the Order as a whole, and not just particular sentences or phrases taken out of context, *see Humana, Inc. v. Board of Adjustment*, 189 Colo. 79, 82, 537 P.2d 741, 743 (1975) ("In construing a section of a legislative act, it is fundamental that the whole of the act must be read and considered in context."); *People ex rel. Dunbar v. Colorado Polytechnic College*, 184 Colo. 305, 309, 520 P.2d 736, 737-38 (1974) ("a fundamental principle of statutory construction [is] that the meaning of words used in a statute must be discerned by reading the entire statute"); *Public Utils. Comm'n v. Stanton Transp. Co.*, 153 Colo. 372, 377, 386 P.2d 590, 593 (1963) ("a rule of statutory construction [is] that to ascertain the legislative intent the court must consider the statute as a whole, and not look to isolated words and expressions"), in order to determine whether there is any reasonable and practical interpretation that renders the Order facially constitutional.

When viewed as a whole, it is evident that the Order focuses primarily on the detection and prevention of *on-duty* drug or alcohol use or impairment.[9] In addition, the Order also addresses concerns regarding *off-duty* alcohol and drug use by employees who hold public health- and safety-sensitive positions.[10] It is therefore unlikely that the provision of the Order stating that employees must be

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[9] For example, the "Policy Overview" section of the Order states:

> Being under the influence of a drug or alcohol *on the job* may pose serious safety and health risks not only to the user but to all those who work with the user. The possession, use or sale of an illegal drug or use of alcohol *in the workplace* may also pose unacceptable risks for safe, healthful and efficient operations.

(Emphasis added.) In addition, part II of the Order prohibits use or impairment of employees "while performing City business or while in a City facility," and it is specifically entitled *"On-The-Job* Use, Possession or Sale of Drugs or Alcohol" (emphasis added).

[10] For example, in its "Pre-Employment Screening" section, the Order provides that for "those positions where the public health and safety may be affected, the City may implement . . . pre-employment screening practices designed to prevent hiring individuals who use illegal drugs or individuals whose use of legal drugs or alcohol indicates a potential for impaired or unsafe job performance."

In addition, the Order provides in its "Policy Overview" section that Denver's drug-testing program is designed, in part, to adhere to certain other laws and regulations that are attached as an appendix to the Order. These include a Denver Fire Department regulation according to which fire fighters are prohibited from using or possessing illegal drugs both on and off duty, and a Denver Police Department policy according to which the illegal use of any controlled substance under any circumstance is prohibited.

prepared to submit to "blood, or urine or other alcohol or drug screening where there is reasonable suspicion of illicit use" – or any other provision of the Order – contemplates blood- or urinalysis-drug-testing of employees who do *not* hold public safety- or security-sensitive positions, based only on reasonable suspicion of *off-duty* drug or alcohol use or impairment. More important, a reasonable and practical interpretation of the Order is that it does not.

B

In determining whether the Order provides for mandatory testing of employees who *do* hold public safety- or security-sensitive positions, based on *off-duty* alcohol or drug use or impairment, but with less than objectively established reasonable suspicion of such use or impairment, we likewise consider the plain language of the Order, taken in context, to determine whether there is any reasonable and practical interpretation that renders it facially constitutional.

The Order provides:

> When a supervisor has *reasonable suspicion* that an employee is in violation of this policy the supervisor should immediately consult with an appropriate member of the in-house personnel staff or with the City Attorney's Office to determine further actions. However it is recognized that if the employee appears to be under the influence of drugs or alcohol, or alcohol or

> drugs are in his or her possession, immediate action may be required.

and:

> Employees may be required to submit to blood, or urine or other alcohol or drug screening where there is *reasonable suspicion* of illicit use or the employee is under the influence of or impaired by alcohol or drug.

(Emphasis added).

To the extent that the policy contained in the Order prohibits off-duty alcohol or drug use or impairment by employees who hold safety-sensitive positions, these two quoted provisions plainly state that it is only "reasonable suspicion" of such behavior that may trigger a drug test. To be sure, the Order does not contain as many explicit safeguards on how reasonable suspicion is to be determined by an employee's supervisors as the program examined by the court in *Local 2391*. *See supra* note 8. Neither, on the other hand, does the Order suggest that anything less than reasonable suspicion based on objective and credible evidence is sufficient. Because we prefer any reasonable and practical interpretation of the Order that renders it facially constitutional, *see supra* part IIA, we construe the Order as requiring reasonable suspicion established by objective and credible evidence to the extent that such suspicion may trigger a drug test of an employee for alleged on- or off-duty alcohol or drug use or impairment.

III

For the foregoing reasons, the provisions of the Order that pertain to drug testing based on reasonable suspicion are not facially invalid under the Fourth Amendment, and the plaintiffs have failed to state a claim that they are, regardless of whether the plaintiffs hold safety-sensitive positions. Consequently, we reverse the judgment of the court of appeals and remand for further proceedings consistent with this opinion.

JUSTICE VOLLACK dissents and JUSTICE KIRSHBAUM joins in the dissent.

City and County of Denver v. Casados, No. 92SC195

JUSTICE VOLLACK dissenting:

The majority holds that the plaintiffs in the present case have failed to state a claim "under the Fourth Amendment that the [drug testing policy provisions] for testing based on reasonable suspicion of alcohol or drug use or impairment are facially" unconstitutional. Maj. op. at 7. I disagree. I find that the decisions in *American Federation of Government Employees, Local 2391 v. Martin,* 969 F.2d 788 (9th Cir. 1992), and *National Treasury Employees Union v. Yeutter,* 918 F.2d 968 (D.C. Cir. 1990), do not provide a bright line rule with which to evaluate the City and County of Denver's drug testing policy. Rather, I find that *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab,* 489 U.S. (1989), establish

that courts must first ascertain whether there are special needs beyond the need for normal law enforcement before balancing government interests in drug testing against individuals' Fourth Amendment rights. I conclude that there are no special needs in this case, and that no interests need to be balanced. Were I to engage in such balancing, I would conclude that the drug testing policy is facially unconstitutional. I dissent.

I.

The majority's analysis of the plaintiffs' facial challenge to the constitutionality of the drug testing policy "is guided primarily by two recent decisions by the United States Court of Appeals, specifically, *American Federation of Government Employees, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992), and *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990)." Maj. op. at 7. The majority notes that these two cases rely on *Skinner* and *Von Raab*. The majority finds that *Local 2391* and *Yeutter* provide the appropriate framework for determining whether drug testing policies contravene the Fourth Amendment to the United States Constitution. Maj. op. at 12. The majority concludes that, pursuant to *Local 2391* and *Yeutter*, drug testing policies are unconstitutional if they:

> (A) provide for mandatory testing of employees who do *not* hold public safety- or security-sensitive positions, based only on reasonable suspicion of *off-duty* alcohol or drug use or impairment, or (B) provide for mandatory testing of employees who *do* hold public safety- or security-sensitive positions, based on *off-duty*

> alcohol or drug use or impairment, but with less than objectively established reasonable suspicion of such use or impairment.

Id. Yeutter and *Local 2391*, however, neither establish such a bright line rule nor support the result reached by the majority.

A.

The Yeutter Decision

In *Yeutter*, the National Treasury Employees Union appealed a district court ruling that permitted the United States Department of Agriculture (USDA) "to proceed with random urinalysis drug testing of certain USDA motor vehicle operators and 'reasonable suspicion' drug testing of other Department workers." *Yeutter*, 918 F.2d at 969. The United States Court of Appeals affirmed the USDA's plan to test motor vehicle operators, but did not approve of that portion of the plan regarding "reasonable suspicion" testing. *Id.* at 969-70.

The *Yeutter* court commenced its analysis by reviewing the United States Supreme Court decisions in *Skinner* and in *Von Raab*. The *Skinner* Court approved "post-accident drug testing of railroad employees and permitted testing after rules violations or minor accidents, and upon suspicion of on-duty impairment." *Yeutter*, 918 F.2d at 970. The *Yeutter* court observed that "the difficulty of detecting and deterring on-duty drug use through less intrusive means" was one of several important factors underlying the *Skinner* Court's analysis. *Id.* at 971. The *Von Raab* Court approved a drug testing plan "that mandated urinalysis of employees directly involved in drug

interdiction and those required to carry firearms." *Yeutter*, 918 F.2d at 971. The *Yeutter* Court noted that the United States Supreme Court decisions in both *Skinner* and *Von Raab* followed the same analytic path wherein the public interest in drug testing was weighed against the reasonable privacy expectations of tested employees. *Id.*

With respect to motor vehicle operators, the *Yeutter* court relied on *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1960 (1990), which held that safety interests and "strong national security concerns supported testing of these employees." *Yeutter*, 918 F.2d at 971. The *Yeutter* court balanced the reasonable privacy expectations of the motor vehicle operators against the government's safety interests, and concluded that the privacy expectations were outweighed. *Id.* at 972. In so concluding, the *Yeutter* court noted that "the Supreme Court 'has quite clearly eschewed an approach to drug testing based on bright lines.' " *Id.* (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 490 n.9 (D.C. Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 865 (1990)).

With respect to the USDA's plan for drug testing of all Food and Nutrition Service (FNS) employees premised upon "reasonable suspicion," the *Yeutter* court reiterated that the validity of the drug testing plan turns on a balancing of the intrusion on the individual's Fourth Amendment interests against promotion of legitimate government interests. *Yeutter*, 918 F.2d at 973. The *Yeutter* court concluded that any legitimate government interest did not extend farther than the workplace, and invalidated that part of the USDA's plan that permitted drug testing premised upon reasonable suspicion of off-duty

drug use. In so concluding, the *Yeutter* court reiterated its holding in *Harmon*, wherein it stated that

> "federal employment alone is not a sufficient predicate for mandatory urinalysis," and that "the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."

Yeutter, 918 F.2d at 974 (quoting *Harmon*, 878 F.2d at 490).

The *Yeutter* court separately considered that portion of the USDA's plan which permitted drug testing based upon reasonable suspicion of on-duty drug use. The *Yeutter* court found that "mandatory urinalysis represents a substantial intrusion on employee privacy." *Id.* Thus, the *Yeutter* court rejected the government's "abortive suggestion that FNS' mission to advance human nutrition and protect the agricultural economy" outweighed the employees' privacy interest. *Id.* at 975. The *Yeutter* court concluded, without identifying any additional government interests, "that employee privacy concerns [did not] outweigh the government's interest in testing employees reasonably suspected of using drugs, or of being drug-impaired, while on duty." *Id.* at 975.

In summary, the *Yeutter* court did not apply a bright line test when evaluating the different portions of the drug testing plan at issue; rather, the *Yeutter* court conducted an analysis in each instance that involved a balancing of individual privacy interests against government interests in drug testing. The *Yeutter* court additionally emphasized the importance of finding "direct nexus" between the nature of an employee's job and the nature

of the feared violation when evaluating the propriety of a drug testing plan.

B.

The Local 2391 Decision

In *Local 2391*, the United States Department of Labor (DOL) appealed from a district court order and argued that "the district court erred by holding that the Fourth Amendment bars drug testing of DOL employees *in public health and safety- sensitive or security-sensitive positions* based on reasonable suspicion of off-duty drug use." *Local 2391*, 969 F.2d at 789 (emphasis added). The United States Court of Appeals opinion in *Local 2391* was expressly limited to employees holding public health and safety-sensitive or security-sensitive positions. *Id.* at 790, 792.

At the outset of its analysis, the *Local 2391* court noted that *Yeutter* did not address whether employees holding safety- or security-sensitive positions could be tested on reasonable suspicion of off-duty drug use or impairment. The *Local 2391* court stated that "whether the government may validly require its employees to submit to drug testing is determined ' "by balancing its intrusion on the [employees'] Fourth Amendment interests against its promotion of legitimate government interests." ' " *Id.* at 791 (quoting *Skinner*, 489 U.S. at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979))). The *Local 2391* court stated that, "[w]here the government has a legitimate public health and safety or national security interest in confirming whether an employee is using illegal drugs on- or off-duty, the existence of reasonable suspicion

weighs in favor of finding that a resulting search is reasonable." *Id.* at 792. The *Local 2391* court thus found the DOL's plan to be facially constitutional, but expressly reserved a determination of the plan's constitutionality as applied. *Id.* at 793.

C.

Application of Yeutter and Local 2391 to the Present Case

The majority states that "[t]he *results* in *Yeutter* and *Local 2391*, to the extent that they are relevant to the issue before us, accord with both precedent and reason." Maj. op. at 12. The result reached in *Local 2391* is not relevant to the issue on which we granted certiorari insofar as the result reached in *Local 2391* is expressly limited to "employees holding clearly specified public health and safety- or national security-sensitive positions." *Local 2391*, 969 F.2d at 792. The result reached in *Yeutter*, insofar as it concerns "reasonable suspicion" testing, does not, in my opinion, accord with either precedent or reason because the *Yeutter* court did not articulate government interests when attempting to engage in "balancing." Further, the *Yeutter* court, after reiterating its previous holding, did not determine whether there was a "direct nexus" between *all* USDA employees and any feared violation.

I thus do not agree with the majority that the issue upon which we granted certiorari is resolved by examining whether the drug testing policy in the present case

> (A) provide[s] for mandatory testing of employees who do *not* hold public safety- or

> security-sensitive positions, based only on reasonable suspicion of *off-duty* alcohol or drug use or impairment, or (B) provide[s] for mandatory testing of employees who *do* hold public safety- or security-sensitive positions, based on *off-duty* alcohol or drug use or impairment, but with less than objectively established reasonable suspicion of such use or impairment.

Maj. op. at 12-13. Neither *Yeutter* nor *Local 2391* establishes such a bright line rule. Rather, both cases, in their *analytical sections relying on Skinner and on Von Raab*, dictate that this court balance government interests against individual employees' privacy concerns in determining whether the drug testing policy is facially constitutional. When balanced, the interests of the City and County of Denver do not outweigh individual employee Fourth Amendment interests.

II.

A.

Fourth Amendment Analysis

"[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer. . . . " *Von Raab*, 489 U.S. at 665 (relying on *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)); *Skinner*, 489 U.S. at 613-16. "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' " *Skinner*, 489 U.S. at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). It is well settled that blood tests and

urine tests constitute searches under the Fourth Amendment. *Skinner,* 489 U.S. at 616-17.

In criminal cases generally, "a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id.* at 619 (relying on *Payton v. New York,* 445 U.S. 573, 586 (1980)); *see Von Raab,* 489 U.S. at 665. The United States Supreme Court has "recognized exceptions to this rule, however, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Skinner,* 489 U.S. at 619 (quoting *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987)). Thus, when faced with special needs *beyond the normal need for law enforcement,* the United States Supreme Court "[has] not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Id.; see Von Raab,* 489 U.S. at 665.

B.

The United States Supreme Court Decisions

In *Skinner,* the Railway Labor Executives' Association appealed from a determination upholding the Federal Railroad Administration's drug testing plan requiring employees to submit to blood and urine tests upon the occurrence of an accident or specified incident. *Skinner,* 489 U.S. at 612-13. The United States Supreme Court first found that the "Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.' "

Skinner, 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. at 873-74). The Supreme Court noted in *Skinner* that "[t]he problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago," and that accidents involving alcohol or drug use from 1972 through 1983 " 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million.' " *Skinner*, 489 U.S. at 606-07 (quoting 48 Fed. Reg. 30726 (1983)).

After first making a finding of special needs, the Supreme Court reviewed the regulations at issue and found that the plan applied only to employees engaged in safety-sensitive tasks. *Id.* at 620. The Supreme Court found that the Government prescribed the plan in order " 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.' " *Id.* at 620-21 (quoting 49 C.F.R. § 219.1(a) (1987)). Thus, the Supreme Court stated that the "governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty." *Id.* at 621. The Supreme Court then considered whether the governmental interests justified the privacy intrusions at issue. The Supreme Court engaged in extensive analysis of the Government's interests and the individual privacy concerns involved, and concluded that the Government's compelling interests in safety outweighed individual privacy concerns. *Id.* at 624-33.

In *Von Raab*, a union of federal employees appealed from a determination upholding the United States Customs Service (the Customs Service) drug testing program.

Von Raab, 489 U.S. at 663-65. Under the plan, "[d]rug tests were made a condition of placement or employment for positions that [met] one or more of three criteria": direct involvement in drug interdiction, requirement that the employee carry a firearm, or requirement that the employee handle classified information. *Id.* at 660-61.

The Supreme Court noted at the outset that "[i]t is clear that the Customs Service's drug testing program is not designed to serve the ordinary needs of law enforcement." *Id.* at 666. The Supreme Court noted that "[t]he purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service." *Id.* The Supreme Court considered the Government's interests and the privacy interests of the employees seeking promotion to the covered positions.

The Supreme Court noted that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. The Supreme Court additionally stated that "the Government has a compelling interest in ensuring that the front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," and that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 670-71. The Supreme Court opined that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Id.* at 670.

The Supreme Court concluded that the possible harm against which the Customs Service sought to guard was substantial, and that "the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." *Id.* at 675. The Supreme Court, however, did not approve of that portion of the Customs Service's plan concerning employees who handle classified information. In assessing that category of employees, the Supreme Court stated that "[i]t is not clear . . . whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information." *Id.* at 678. The Supreme Court queried whether the Customs Service had defined the category more broadly than necessary in order to meet the stated purposes, and thus rejected that part of the drug testing plan. *Id.*

C.

Fourth Amendment Analysis in the Present Case

As the Court of Appeals noted in *Casados v. City and County of Denver,* 832 P.2d 1048 (Colo. App. 1992), the drug testing plan requires employees to submit to blood or urine tests "where there is reasonable suspicion of illicit use or the employee is under the influence of or impaired by alcohol or drug." *See id.* at 1050. The drug testing policy thus condones conduct that constitutes a search under the Fourth Amendment.

Under *Skinner* and *Von Raab,* such searches may be reasonable if the "Fourth Amendment intrusion serves special governmental needs, beyond the normal need for

law enforcement." *Von Raab*, 489 U.S. at 665. The drug testing policy states as follows:

> As an employer, the City is required to adhere to various federal, state and local laws and regulations regarding alcohol or drug abuse. . . . The City also has a vital interest in maintaining safe, healthful and efficient working conditions for its employees. Being under the influence of a drug or alcohol on the job may pose serious safety and health risks not only to the user but to all those who work with the user.

Other than compliance with regulations and an interest in maintaining a safe work environment, the drug testing policy does not contain any additional justifications for drug testing. In fact, the drug testing policy states that, "[w]hen a supervisor has reasonable suspicion that an employee appears to be in possession of or selling or transferring illicit drugs, the police are to be contacted." The drug testing policy evinces, by its plain language, an intent to comply with laws which, in my opinion, is best served by normal law enforcement. Thus, under *Skinner* and *Von Raab*, we need not balance government interests against privacy interests because there is no special need for drug testing beyond normal law enforcement expressed in the drug testing policy. Accordingly, the blood and urine searches authorized by the policy amount to an impermissible, unreasonable search under the Fourth Amendment.

Were I to engage in balancing, however, I would find the government's interest in maintaining a safe work environment does not justify the privacy intrusions at issue. Government interest in the safety of a workplace

has been recognized as being reasonable. The drug testing policy is not limited to employees holding safety- or security-sensitive positions. The City and County of Denver, as a governmental unit, does not serve a specialized function such as the interdiction of illegal narcotics which, by its nature, involves safety- or security-sensitive functions. There is no direct nexus between all positions held by City and County of Denver employees and an unasserted, feared violation. Without more, I would not find that the interest in a safe work environment alone justifies the substantial intrusions into all City and County of Denver employees' rights to bodily integrity occasioned by blood and urine testing. *See Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991) (holding that drug testing plan was unconstitutional because the plan subjected a maintenance custodian to suspicionless testing, where no showing that employees' position involved any unusual degree of danger or that there were injuries to maintenance custodians generally); *American Fed'n of Gov't Employees, AFL-CIO, Council 33 v. Thornburgh*, 720 F. Supp. 154 (N.D. Cal. 1989) (entering a preliminary injunction to enjoin enforcement of a drug testing scheme requiring testing of *all* employees of the Federal Bureau of Prisons, regardless of job function and in light of the fact that no evidence was provided demonstrating a special need for indiscriminate testing); *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989) (entering an injunction enjoining random urinalysis testing of United States Department of the Interior employees that held routine job classifications, such as mail and file clerks).

Based on the foregoing, I dissent.

I am authorized to say that JUSTICE KIRSHBAUM joins in this dissent.

SUPREME COURT, STATE OF COLORADO
CASE NO. 92SC195
CERTIORARI TO THE COLORADO
COURT OF APPEALS 90CA1357
DENVER DISTRICT COURT 90CV1497

ORDER OF COURT

THE CITY AND COUNTY OF DENVER and FEDERICO PENA, in his official capacity as Mayor of the City and County of Denver,

Petitioners,

v.

JOHN T. CASADOS, JERRY DRAPER, ROLAND CARTER, and AUGUSTINE VILLALOBOS, and all others similarly situated,

Respondents.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issue set forth below, and the briefs shall be filed as follows:

(a) Petitioners' Opening Brief shall be filed within forty days from this date;

(b) Respondents' Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioners' Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

BY THE COURT, EN BANC, JUNE 22, 1992.

The summary of the issue as announced by the Court this day is as follows:

Whether the court of appeals erred in its determination that Denver's Executive Order 94, providing for alcohol or drug testing based upon reasonable suspicion that an employee is under the influence of alcohol or drugs, violates the Fourth Amendment proscription against unreasonable searches and seizures.

DENIED AS TO ALL OTHER ISSUES.

cc: Darlene M. Ebert
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Honorable Clifton A. Flowers
c/o Honorable John N. McMullen
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

James Benway, Clerk
Colorado Court of Appeals

[seal]
Supreme Court
State of Colorado
Certified to be a full,
true and correct copy

JUN 22 1992

MAC V. DANFORD
Clerk of the
Supreme Court
Court Seal By
Michelle Zeigler
Dept.

COLORADO COURT OF APPEALS January 16, 1992
No. 90CA1357

John T. Casados, Jerry Draper, Roland Carter, Augustine Villalobos, and all others similarly situated,

Plaintiffs-Appellants,

v.

City and County of Denver, Federico Pena in his official capacity as Mayor of the City and County of Denver, The Department of Public Works, and William Roberts in his official capacity as head of the City and County of Denver's Department of Public Works,

Defendants-Appellees.

Appeal from the District Court of the City and County of Denver

Honorable Clifton A. Flowers, Judge
No. 90CV1497

Division IV
Opinion by
JUDGE ROTHENBERG
Sternberg, C.J., and
Hume, J., concur

JUDGMENT REVERSED
AND CAUSE REMANDED
WITH DIRECTIONS

Jennifer A. Payne, Longmont, Colorado; John Mosby, Denver, Colorado, for Plaintiffs-Appellants

Patricia L. Wells, City Attorney, Darlene M. Ebert, Assistant City Attorney, Denver, Colorado, for Defendants-Appellees

Plaintiffs John T. Casados, Jerry Draper, Roland Carter, and Augustine Villalobos appeal the judgment of dismissal entered in favor of defendants, the City and

County of Denver, Mayor Federico Pena (in his official capacity), the Department of Public Works, and William Roberts (in his official capacity). We reverse and remand.

In October 1988, Mayor Pena issued Executive Order 94 which established a drug and alcohol testing policy for City and County of Denver employees. The stated purpose of the executive order was to ensure "safe, healthful, and efficient working conditions for Denver employees."

Under the terms of the executive order, supervisors may require employees to submit to blood or urine tests at designated facilities if the supervisors have "reasonable suspicion" that the employees are using illegal drugs or alcohol or are under the influence of drugs or alcohol. Also, if there has been a workplace accident that may have been caused by human error which could be drug or alcohol related, then employees may be required to submit to testing even if they do not exhibit symptoms of being under the influence.

Employees who test positive or who refuse to be evaluated for drug or alcohol use are subject to disciplinary action including dismissal. Alternatively, employees who test positive may be evaluated for drug or alcohol abuse problems and ordered to undergo treatment.

Plaintiffs are employees of the City and County of Denver who, for various reasons, have been ordered to undergo drug and/or alcohol tests by their supervisors and, therefore, have been personally affected by the executive order. In February 1990, plaintiffs filed this class action lawsuit challenging the constitutionality of Executive Order 94 and requesting declaratory and injunctive relief barring its enforcement.

In their complaint, as subsequently amended, plaintiffs claimed that the executive order violated and continues to violate their rights to be free from unreasonable searches, to privacy, to due process of law, and to equal protection of the law. More specifically, plaintiffs claim that the executive order is unconstitutionally vague because it fails to define "reasonable suspicion," fails to identify the drugs for which they are being tested, fails to establish standards for determining when employees should be required to report for drug or alcohol testing, fails to provide for alternative testing methods, and fails to specify the testing methods to be used.

The district court granted defendants' motion to dismiss plaintiffs' complaint for failure to state a claim for relief.

I.

The initial issue for our resolution is whether this court has jurisdiction to address the plaintiffs' facial constitutional challenges to the executive order. We conclude that it does.

Under §13-4-102(1), C.R.S. (1987 Repl. Vol. 6A), the court of appeals is accorded jurisdiction over appeals from final judgments of the district courts except in, *inter alia*:

> (b) Cases in which the constitutionality of a statute, municipal charter provision, or an ordinance is in question. . . .

If a statute is plain and its meaning is clear it must be interpreted as written. *Williams Natural Gas Co. v. Mesa*

Operating Limited Partnership, 778 P.2d 309 (Colo. App. 1989). Hence, since we are here being asked to determine the facial constitutionality of an executive order rather than a statute, charter provision, or ordinance, this court does have jurisdiction to address the plaintiffs' contentions.

II.

Plaintiffs first contend that the executive order is unconstitutionally vague and violates their rights to due process. We disagree.

We believe the same standard of review should be used for an executive order that is used for a statute or ordinance. An ordinance or statute is presumed to be constitutional, and the burden is on the party attacking it to establish that it is unconstitutional beyond a reasonable doubt. *People ex rel. Arvada v. Nissen*, 650 P.2d 547 (Colo. 1982). A statute or ordinance which is unconstitutionally vague constitutes a denial of due process of law under the United States and Colorado Constitutions. *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

"The essence of a vagueness challenge is that the law fails to reasonably forewarn persons of ordinary intelligence of what is prohibited . . . and lends itself to arbitrary and discriminatory enforcement because it fails to provide explicit standards for those who apply it." *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983). The root of the vagueness doctrine is fairness and notice of the prohibited conduct. *See Puzick v. Colorado Springs*, 680 P.2d 1283 (Colo. App. 1983).

A provision "is not void for vagueness if it fairly describes the conduct forbidden, and persons of common intelligence can readily understand its meaning and application." *Eckley v. Colorado Real Estate Commission*, 752 P.2d 68, 73 (Colo. 1988). Further, "[a] high degree of exactitude in draftsmanship is not required for an ordinance to pass due process scrutiny." *Price v. City of Lakewood*, 818 P.2d 763 (Colo. 1991).

The main thrust of plaintiffs' argument is that the executive order is unconstitutionally vague because it does not precisely define "reasonable suspicion" or identify the drugs for which an employee can be tested. However, a number of recent cases throughout the country have upheld drug or alcohol testing based on similar "reasonable suspicion" standards.

For example, in *Skinner v. Railway Labor Executives, Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), several railway employees' unions unsuccessfully challenged the constitutionality of Federal Railroad Administration Safety regulations which permitted blood and urine testing of railroad employees under certain circumstances. The federal regulations provided that supervisors may order employees to submit to breath tests if the supervisors had "reasonable suspicion" that the employees were under the influence of alcohol. The reasonable suspicion had to be "based upon specific, personal observations concerning the appearance, behavior, speech or body odors of the employee."

The railroad safety regulations further provided that employees may be required to submit to urine tests if two supervisors suspected alcohol impairment. Further,

supervisors were required to receive specialized training in detecting drug intoxication before they required an employee to be tested for drugs.

In sum, the Supreme Court upheld testing based upon "reasonable suspicion" where the federal regulations specified the conduct allowing supervisors to order testing and the regulations also required supervisors to receive specialized training.

Similarly, in *American Federation of Government Employees v. Cavazos*, 721 F. Supp. 1361 (D.C. Cir. 1989), plaintiffs' challenge to the constitutionality of the Department of Education's random urinalysis testing program was also unsuccessful. That program allowed testing of employees if supervisors had "reasonable suspicion" to believe the employees were using drugs, and it delineated the grounds that might constitute reasonable suspicion. The plan also specified the drugs for which employees might be tested.

Plaintiffs acknowledge these cases but contend that they involved regulations and testing programs which specified the conduct giving rise to "reasonable suspicion" that employees were using alcohol or drugs. In contrast, Denver's drug testing policy neither defines reasonable suspicion nor provides training for supervisors or standards for them to follow in determining whether there is reasonable suspicion to believe that an employee is under the influence of drugs or alcohol.

Thus, according to plaintiffs, Denver's executive order allows the exercise of unbridled discretion by supervisors, allows supervisors to declare arbitrarily that

employees are under the influence, and allows supervisors to order employees to submit to blood or urine tests.

Although we agree that it might have been preferable for the executive order to have specified the conduct giving rise to "reasonable suspicion" and to have provided for the training of supervisors, we cannot overlook the fact that the term "reasonable suspicion" has been widely used with approval in Colorado. *See Colorado v. Sosbe*, 789 P.2d 1113 (Colo. 1990) (reasonable suspicion of traffic violation found because defendant was speeding); *People v. Garcia*, 789 P.2d 190 (Colo. 1990) (reasonable suspicion not present when stop was made based on anonymous tip and officer's observations of non-criminal activity); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983) (reasonable suspicion not present when police recognized defendant, who was "more or less just standing in the lot" and then ran after police made eye contact).

We therefore conclude that the term "reasonable suspicion," used in the context of this executive order, is sufficiently clear so as to provide reasonable notice to persons of ordinary intelligence of what is prohibited. *See City of Englewood v. Hammes, supra.* Nor does the executive order's failure to define the drugs for which employees can be tested make the order unconstitutionally vague. Thus, the plaintiffs have failed to meet their burden of proving Executive Order 94 unconstitutionally vague.

III.

Plaintiffs next contend that the trial court erred in dismissing their complaint for failure to state a claim for relief because Executive Order 94 violates their Fourth Amendment rights to be free from unreasonable searches and seizures. We agree that such dismissal was error.

The Fourth Amendment protects individuals from unreasonable governmental intrusion provided that they have a reasonable expectation of privacy. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The act of taking blood for a blood test and the process of collecting and testing urine samples constitute an invasion of an employee's privacy interest and therefore constitute a "search" under the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n, supra; People v. Williams,* 192 Colo. 249, 557 P.2d 399 (1976) (the taking of a blood sample is a search thereby requiring probable cause); *Derdeyn v. University of Colorado,* ___ P.2d ___ (Colo. App. No. 89CA2044, December 19, 1991) (collection and testing of urine samples is a "search" within the meaning of the Fourth Amendment).

However, the Fourth Amendment does not prohibit all searches, only unreasonable ones. *Terry v. Ohio, supra,* In order to determine whether a particular search is reasonable, the courts must balance the intrusion upon an individual's Fourth Amendment interests against the legitimate governmental interests that may be promoted by the search. *See Skinner v. Railway Labor Executives' Ass'n, supra.*

Thus, in *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the United States Supreme Court upheld the testing of all Customs Service employees seeking transfers to positions involving the interdiction and seizure of contraband or requiring the employees to carry firearms. The Court reasoned that the government's compelling interest in safety outweighed the employees' privacy interests. *See also Skinner v. Railway Labor Executives, Ass'n, supra* (urine testing of railroad employees involved in train accidents upheld; government's interest in public safety outweighed the employees' privacy interests); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (mandatory urine testing of correctional officers who carry firearms or have regular access to inmates upheld because drug-impaired employees could cause immediate safety risks); *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation's random testing of certain employees, largely air traffic controllers, upheld as constitutional because of the "safety and security criticalness" of their jobs).

In contrast, the courts have not permitted employees to be tested if the sole governmental interest was merely "to maintain the integrity of the work force." Rather, safety considerations had to be involved. *See Taylor v. O'Grady, supra* (governmental interest in maintaining the integrity of the work force insufficient to overcome the privacy interests of correctional employees who do not come into regular contact with prisoners); *National Federation of Government Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (random urine testing of Army aviation and

police/guard employees upheld for safety reasons; however, testing of Army lab technicians not permitted because the governmental interest in that testing does not outweigh the employees' expectations of privacy); *Harmon v. Thornberg*, 878 F.2d 484 (D.C. Cir. 1989) (random urine testing of employees with access to sensitive information justified; however, governmental interest in maintaining the integrity of the work force and public safety were not sufficient to allow testing of other employees).

Our supreme court has consistently held that courts should interpret statutes to avoid a construction that might contravene constitutional standards. *Colorado Dog Fanciers, Inc. v. City & County of Denver*, ___ P.2d ___ (Colo. No.90SA342, November 12, 1991); *Forbes v. Poudre School District R-1*, 791 P.2d 675 (Colo. 1990). The same is true of executive orders such as the one at issue here.

The stated purpose of Executive Order 94 is to maintain "safe, healthful, and efficient working conditions for . . . employees," and it is reasonable to assume that some Denver employees such as firefighters and police officers work in safety sensitive positions, or perform jobs involving immediate safety risks which might be caused by drug or alcohol impairment. The problem, however, is that the executive order covers all employees, and the general governmental interest in maintaining a safe work place does not outweigh the privacy interests of those employees not in safety sensitive positions. Nor does it reflect a compelling state interest rising to the level required by *Skinner* and *Von Raab* as to such employees not in safety sensitive positions. *See National Treasury Employees' Union v. Von Raab, supra; National Federation of Government Employees v. Cheney, supra.*

Thus, although other disciplinary measures may exist to prevent drug and/or alcohol use by Denver employees not working in safety sensitive positions, we conclude that the Fourth Amendment and analogous provisions of the Colorado Constitution require that Executive Order 94 be construed to limit drug and/or alcohol testing only to those Denver employees who work in safety sensitive positions. *See Derdeyn v. University of Colorado, supra* (no compelling state interest found for testing intercollegiate athletes at University of Colorado).

Finally, the question of which plaintiffs, if any, may be tested for drugs and/or alcohol cannot be resolved without an evidentiary hearing or, at least, proper verification describing plaintiffs' job functions and their relationships to public safety. Here, however, the trial court dismissed the complaint at an early stage in the proceedings, and the record before us contains no factual determinations as to which of plaintiffs' particular jobs are of a critical nature or involve immediate safety risks that might be caused by drug or alcohol-impaired employees.

A motion to dismiss for failure to state a claim should not be granted unless the plaintiff can prove no set of facts to support his claim which would entitle him to relief. *See Davidson v. Dill,* 180 Colo. 123, 503 P.2d 157 (1972).

Here, we conclude that the plaintiffs have stated a claim that the executive order violates their rights to be free from unreasonable searches under the Fourth Amendment and Colorado Const. art. II, §§7 & 29. Thus, the trial court erred in dismissing the complaint.

In view of these rulings, we need not address plaintiffs' remaining contentions.

The judgment of dismissal is reversed, and the cause is remanded for further proceedings consistent with this opinion.

CHIEF JUDGE STERNBERG and JUDGE HUME concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 90CV1497

ORDER

JOHN T. CASADOS, etal,

Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, etal,

Defendants.

IT IS ORDERED, based upon the memorandum briefs submitted, that Defendants' Motion to Dismiss shall be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that a judgment of dismissal, with prejudice, be and the same is hereby entered in favor of the Defendants and against the Plaintiffs.

DONE this 25th day of June, 1990.

BY THE COURT:

/s/ Clifton A. Flowers
CLIFTON A. FLOWERS
District Judge

cc: John Mosby, Esq.
Darlene M. Ebert, Esq.

EXECUTIVE ORDER 94 WITH ADDENDUM
ALCOHOL AND OTHER DRUGS POLICY
FOR
CITY AND COUNTY OF DENVER EMPLOYEES

Policy Overview

As an employer, the City is required to adhere to various federal, state and local laws and regulations regarding alcohol or drug abuse. The City also has a vital interest in maintaining safe, healthful and efficient working conditions for its employees. Being under the influence of a drug or alcohol on the job may pose serious safety and health risks not only to the user but to all those who work with the user. The possession, use or sale of an illegal drug or use of alcohol in the workplace may also pose unacceptable risks for safe, healthful and efficient operations.

The City also maintains an Office of Employee Assistance and provides Department of Safety psychologists that offer help to employees who seek assistance for alcohol or drug abuse and other personal or emotional problems.

Within the legal framework and with these basic objectives in mind, the City has established the following policy with regard to use, possession or sale of alcohol or drugs.

Policy Statement

I. PRE-EMPLOYMENT SCREENING

For those positions where the public health or safety may be affected, the City may implement, with the approval of

the City Attorney's Office, pre-employment screening practices designed to prevent hiring individuals who use illegal drugs or individuals whose use of legal drugs or alcohol indicates a potential for impaired or unsafe job performance.

PRE-EMPLOYMENT TESTING

A. Alcohol

Where medical evidence indicates that current use of alcohol is determined to be a potential safety risk or at a level to impair job performance, employment will be denied.

B. Legal Drugs

Where use of a prescription drug is detected, applicants may be required to offer proof that the drug has been prescribed by a physician for the applicant. If the applicant is unable to provide such proof, employment may be denied. Employment may also be denied, in accord with applicable laws concerning handicapped persons, where future or continued use of the drug poses a potential safety risk or would impair job performance.

The Civil Service Commission, the Career Service Authority, or the Occupational Health and Safety Center will inform the job applicant of this drug screening prior to such screening.

C. Illegal Drugs

Applicants for employment for positions where the public health or safety may be affected may be required to

undergo urinalysis or other screening for illegal drugs. The Civil Service Commission or Career Service Authority will inform the job applicant of this drug screening prior to such screening. Refusal by an applicant to submit to a test shall result in denial of employment. When the presence of an illegal drug is detected in the job applicant, employment may be denied.

II. ON-THE-JOB USE, POSSESSION OR SALE OF DRUGS OR ALCOHOL

A. Alcohol

Being under the influence or impaired by alcohol by any employee while performing City business or while in a City facility is prohibited. Consumption of alcohol in a City facility, in a City vehicle or on City premises is prohibited unless consumed at an officially sanctioned private function, e.g., an invitation only library reception.

B. Legal Drugs

It is the responsibility of the employee who works in a position operating a vehicle or dangerous equipment or affecting the public health or safety to advise management that he or she is taking a prescription drug which may affect performance. The use or being under the influence of any legally obtained drug by any employee while performing City business or while in a City facility may be prohibited if such use of influence may affect the safety of co-workers or members of the public, the employee's job performance, or the safe or efficient operation of the City facility. An employee may continue to

work, even though under the influence of a legal drug, if the appointing authority or a designee has determined, after consulting with the Occupational Health and Safety Center that the employee does not pose a threat to his or her own safety or the safety of co-workers and that the employee's job performance is not significantly affected by the legal drug. Otherwise, the employee may be required to use sick leave or take a leave of absence or comply with other appropriate non-disciplinary action determined by the appointing authority or a designee.

C. Illegal Drugs

The use, sale, purchase, transfer or possession of an illegal drug by any employee while in a City facility or while performing City business is prohibited. For the classified service employees and the deputy sheriffs of the Department of Safety, the presence in any detectable amount of any illegal drug in an employee at any time is prohibited.

Policy Implementation

III. PROCEDURES FOR MANAGEMENT AND SUPERVISORS

When a supervisor has reasonable suspicion that an employee is in violation of this policy the supervisor should immediately consult with an appropriate member of the in-house personnel staff or with the City Attorney's Office to determine further actions. However it is recognized that if the employee appears to be under the influence of drugs or alcohol, or alcohol or drugs are in his or her possession, immediate action may be required.

Where this is the situation, the supervisor should do the following:

A. Under the Influence of Alcohol

The supervisor should confront the employee with the suspicion and order the employee to the Occupational Health and Safety Center (day hours) or Denver General Psychiatric and Substance Abuse Emergency Room Service or the Denver Police Department DUI facilities for an evaluation. Arrangements are to be made by the supervisor to provide transportation for the employee to the evaluation site.

If the employee refuses to go to be evaluated, arrangements should be made for the employee to be transported home.

*Caution: Once a supervisor has reasonable suspicion that an employee appears to be under the influence of alcohol and should the employee refuse an order to be evaluated and drives off in their own or a city vehicle, the police must be notified immediately.

B. Use, Possession or Sale of Illicit Drugs

When a supervisor has reasonable suspicion that an employee appears to be using illicit drugs while on duty the same procedures apply as when a supervisor has reasonable suspicion that an employee appears under the influence of alcohol.

When a supervisor has reasonable suspicion that an employee appear to be in possession of or selling or

transferring illicit drugs, the police are to be contacted. It is the policy of the Department of Safety for all classified service employees and deputy sheriffs that improper use or possession of controlled substances is grounds for immediate dismissal.

Management and supervisors are to restrict conversations concerning possible violations of this policy to those persons who are participating in the evaluation, investigation or disciplinary action and who have a need to know about the details of the drug/alcohol investigation. This includes not mentioning the name of the employee or employees suspected of violating this policy.

C. Drug and Alcohol Screening

Employees may be required to submit to blood, or urine or other alcohol or drug screening where there is reasonable suspicion of illicit use or the employee is under the influence of or impaired by alcohol or drug. Drug and alcohol screening may also be justified where, even though the employee does not exhibit any observable symptoms of being under the influence, a workplace accident may have been caused by human error which could be drug or alcohol related. If any specimen obtained in a drug screening remains after supervisor authorizes testing, the remaining specimen is to be retained until adjudication of disciplinary action is concluded. The Occupational Health and Safety Center shall ensure that appropriate chain of custody is maintained for all specimens.

D. Investigatory Leave

The supervisor is then to contact management for further guidance. In the absence of such consultation and if the supervisor has a reasonable doubt about the employee's ability to satisfactorily and safely meet job requirements, the supervisor shall place the employee on investigatory leave pending results of testing or other administrative determination.

IV. DUI/DWAI ON OR OFF THE JOB

It is the responsibility of any employee who is required to drive as part of his or her assigned duties or job specification to report to his or her appointing authority any DUI or DWAI charge which results in the loss of a drivers license or the restriction of driving privileges. Every employee who is required to drive as part of his or her assigned duties or job specification shall annually certify that he or she has a currently valid driver's license.

V. NON-COMPLIANCE BY THE EMPLOYEE

Supervisors are not to attempt to use force in seeking compliance with an order. The supervisor is to explain to the employee that noncompliance with the supervisor's order to be evaluated by the Occupational Health and Safety Center will be viewed as refusal to obey the order of a supervisor and subject to discipline, which may include dismissal.

VI. DISCIPLINARY ACTION

Violation of this policy can result in a disciplinary action, up to and including dismissal, even for a first offense. The appointing authority or designee, in lieu of disciplinary action, may enter into an agreement with the employee after consultation with the city attorney's office, for assessment of the employee's alcohol or drug abuse problem and for any treatment suggested by the treatment plan developer. For Career Service Authority employees, the treatment plan developer is the Office of Employee Assistance and for classified service employees, the treatment plan developer is the department psychologist.

VII. FACILITY WORK RULES

Nothing in this policy precludes the appointing authority of any City agency from establishing work rules, which cannot be less stringent than this policy, subject to approval of the City Attorney.

VII. SEARCHES

Searches of employees to investigate work-related misconduct may be conducted when there is reasonable suspicion to believe that the employees are in violation of this policy, and where the scope of the search is reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct. Supervisors shall contact the City Attorney's office for guidance.

IX. CONTRACT PERSONNEL

These policy provisions are applicable to contract personnel. Violation of these provisions or refusal to cooperate with implementation of the policy can result in the City's barring contract personnel from City facilities or participating in City operations.

X. POSTING NOTICES

Clearly posted notices explaining the City's right to carry out search activities should be displayed in appropriate locations throughout the work area. Such postings should emphasize the City's intention to maintain a safe and healthful working environment. In addition, a copy of the City's Drug and Alcohol policy may be given to each employee with each employee acknowledging in writing receipt of the policy.

At a minimum, facility management is to inform all contractors doing work in the facility about the applicable policy provisions and provide a copy of this policy to such contractors. Certain other enforcement actions may be necessary.

XI. DRUG AND ALCOHOL USE RELATIONSHIP TO THE OFFICE OF EMPLOYEE ASSISTANCE AND DEPARTMENT OF SAFETY PSYCHOLOGISTS

The City and County of Denver maintains an Office of Employee Assistance and provides Department of Safety psychologists that offer help to employees who suffer from alcohol or drug abuse and other personal emotional

problems. It is the responsibility of each employee to seek help from the Office of Employee Assistance or Department of Safety psychologist *before* alcohol and drug abuse problems lead to disciplinary problems. Once a violation of this policy occurs subsequent use of the Office of Employee Assistance or Department of Safety psychologist may be part of a condition of continued employment.

APPENDIX

Federal Rehabilitation Act of 1973

For the purposes of the Rehabilitation Act of 1973, 29 U.S.C. § 700, *et seq.*

> "individual with handicaps" means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Colorado Revised Statutes

Under the Colorado statutes, it is a discriminatory or unfair employment practice:

> (a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person

> otherwise qualified because of handicap, but, with regard to a handicap, it is not a discriminatory or unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the handicap, the handicap actually disqualifies the person from the job, and the handicap has a significant impact on the job;

Career Service Authority

Under Career Service Authority regulations, it is a ground for immediate dismissal for an employee to

> (be) under the influence of alcohol while on duty (CSA 16-22(3))
>
> or
>
> illegally (use) habit forming drugs or narcotics, or marijuana on City and County premises or while on duty; or illegally (introduce) or (possess) such substances on City and County premises while on duty. (CSA 16-22(10)
>
> or
>
> Refuse to comply with the orders of an authorized supervisor. (CSA 16-22 (7).

Denver Police Department

Under Denver Police Department policy,

> under no circumstances will the improper or illegal use of any controlled substance be tolerated.

Alcohol abuse is recognized as an illness by the Denver Police Department and it is the policy of the department

> to provide the opportunity for the officer to voluntarily seek treatment and counseling prior to the illness interfering with the officer's performance

although the department reserves the right to take appropriate disciplinary actions for an incident where alcohol abuse is a factor.

Denver Fire Department

Under Denver Fire Department rules and regulations, using or being under the influence of alcohol while on duty, or use, possession or illegal activity involving drugs and controlled substances are major violations. Use or being under the influence of alcohol on duty is a major offense

> because the nature of the fire service requires quick, accurate, efficient judgments to be made. Alcohol may impair a member's ability to perform effectively, thereby endangering other members and the public. 1) First offense: Suspension of up to 1 year. The firefighter may be reinstated if he can prove treatment and rehabilitation. 2) Second Offense: Dismissal.

The Department's drug policy states that:

> Members shall not use or possess any prescription drug, on or off duty, except as prescribed by and under the supervision of a licensed doctor or dentist. The use of any illegal drug, controlled substance, or other substance; the possession of any illegal drug or substance, or any participating activity involving illegal drugs or substances on or off duty, shall subject member to the following discipline: First offense: Dismissal.

ADDENDUM TO EXECUTIVE ORDER 94

This addendum to Executive Order 94 is effective April 10, 1989.

Pursuant to the federal Drug-Free Workplace Act of 1988 (Public Law 100-690, Title V, Subtitle D), the City, as an entity which applies for or receives grants directly from federal agencies, its required to comply with the following provisions of that act. Failure to comply with these provisions may result in loss of grant money or ineligibility for further grants. This Act took effect on March 18, 1989, for contracts applied for, or awarded, on or after this date.

REQUIREMENTS

The grantee is required to certify on every application or grant agreement, that it will provide a drug-free workplace by:

a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violation of this prohibition. This publication requirement is met in part by the terms of Executive Order 94.

b) Establishing a drug-free awareness program informing employees about: the dangers of drug abuse in the workplace; the City's policy of maintaining a drug-free workplace; the availability of drug counseling and rehabilitation, and the Office of Employee Assistance as

well as Department of Safety psychologist; and the penalties that may be imposed on employees for drug abuse violations occurring in the workplace.

Training sessions should be held within each agency to inform the appropriate personnel of the requirements of this law and the significance of establishing a drug-free workplace. Attendance at training sessions is encouraged for all agency personnel, but especially for supervisors.

c) Requiring each employee to sign, as a condition of employment, a certification that he or she will:

i) not unlawfully manufacture, distribute, dispense, possess or use a controlled substance in the workplace, and

ii) notify the employer of any criminal drug statute conviction or violation occurring in the work place no later than five days after such conviction.

d) Distributing this certification statement to all employees. This shall be done by the appointing authority, who is responsible for obtaining the employee's signature and for placing a copy of the signed statement in the employee's personnel file in the agency, and, if applicable, at Career Service or the Civil Service Commission.

e) Notifying the federal agency associated with the federal grant within ten days after receiving notice from the employee or receiving actual notice of a conviction of a criminal drug statute for a violation occurring in the workplace. This notification shall be done by the appointing authority.

f) Disciplining the employee, or requiring the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program coordinated through the Office of Employee Assistance or Department of Safety psychologist within thirty days of receiving notice of any employee convicted for a criminal drug statute violation in the workplace.

g) Continuing to make a good faith effort to maintain a drug-free workplace.